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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

B6

FILE: WAC 02 257 50620 Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer parts manufacturer. It seeks to employ the beneficiary permanently in the United States as a computer sales manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel for the petitioner submits a statement and evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on September 16, 1998. The proffered wage as stated on the Form ETA 750 is \$2,950.13 per month, which equals \$35,401.56 per year.

With the petition, counsel for the petitioner initially provided an unsigned copy of the petitioner's 2001 federal tax return and copies of the petitioner's bank statements for the period from June 2001 through April 2002. After reviewing this documentation, the director issued a request for evidence on November 13, 2002, requiring that the petitioner submit additional evidence establishing its ability to pay the proffered wage from the establishment of the priority date and continuing until the beneficiary obtains lawful permanent residence.¹ In response to the director's request, counsel submitted signed copies of the petitioner's federal tax returns for 1998, 1999, 2000, and 2001, and copies of its quarterly wage reports.²

¹ The request for evidence also requested evidence of the beneficiary's qualifications, with specific reference to his educational background. Counsel provided the requested documentation, which the director found to be sufficient. Since the director did not base his decision to deny the petition upon the beneficiary's qualifications, the issue will not be discussed within the scope of this decision.

² Counsel also submitted additional evidence not requested by the director, including copies of prior approval notices, the petitioner's articles of incorporation, and the beneficiary's passport. These submissions are noted for the record but are not relevant to this decision.

After reviewing the petitioner's net income for the relevant period, the director determined that the evidence submitted did not establish the ability to pay the proffered wage since both the petitioner's net income and net current assets were less than the proffered wage. Accordingly, the director denied the petition.

On appeal, counsel submits a copy of the petitioner's website, a four page document in resume format which provides an overview of the petitioning entity, and duplicate copies of the previously submitted 2001 federal tax return and bank statements from June 2001 through April 2002.

In addressing this matter, the AAO will first analyze the director's decision considering the evidence submitted prior to the decision of the director. The evidence that was newly submitted on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Prior to the adjudication of the petition, the petitioner submitted copies of its federal tax returns for 1998, 1999, 2000, and 2001. The petitioner's net income for each year is as follows:

1998:	\$15,809
1999:	\$38,941
2000:	\$29,951
2001:	\$12,318

In addition, the petitioner's net current assets for each of the four years were substantially outweighed by its liabilities.³

As advised by the director in the request for evidence, the petitioner must show that it had the ability to pay the proffered wage beginning on the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989).

In this case, the priority date is September 16, 1998. The petitioner's 1998 return shows net income of only \$15,809, which is substantially less than the annual proffered wage of \$35,401.56. Since the regulations require proof of eligibility at the priority date, the petitioner has not met the burden of proof required. See 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). Although the petitioner's net income of \$38,941 in 1999 would clearly establish its ability to pay for that particular year, the fact remains that if such ability was not present at the establishment of the priority date, the regulatory requirement has not been met. Additionally, the petitioner's net income for the years 2000 and 2001 is again substantially lower than the proposed annual salary, thereby

³ Specifically, an examination of the petitioner's net current assets and liabilities as set forth on Schedule C demonstrated assets of (\$47,712) for 1998, (\$139,711) for 1999, (\$29,951) for 2000, and (\$12,318) for 2001.

demonstrating that the petitioner did not have the ongoing ability to pay the proffered wage during the relevant period.

Counsel also submits copies of the petitioner's bank statements for the period from June 2001 through April 2002 in an attempt to demonstrate that it had sufficient cash flow to pay the proffered wage. These statements, however, are not persuasive evidence of the petitioner's ability to pay the wage offered because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

Upon review of the financial documentation in the record, it is evident that the director's finding that the petitioner lacked the ability to pay the proffered wage was correct.

On appeal, counsel submits a statement and documentary evidence in the form of a website printout and a company overview. Counsel also submits duplicate copies of the 2001 federal tax return and the bank statements from June 2001 through April 2002. As grounds for the appeal, counsel alleges that the petitioner's net income for 1998 and 2001 was not representative of the company's true financial situation, but merely a manifestation of unforeseen hardship resulting from world events during those particular periods.

If the petitioner's low profits during 1998 and 2001 are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Sonegawa*, the petitioning entity had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that 1998 and 2001 were uncharacteristically unprofitable years for the petitioner. Specifically, there is no evidence to suggest that the petitioner incurred financial hardship or incurred additional expenses in the advancement of its business, such as moving costs or extra rent payments. Moreover, there is no indication that the petitioner was hindered from operating its business during this period, nor is there any documentation that highlights the petitioner's business reputation or client base, other than a four page company resume that appears to have been prepared internally. Finally, there is no evidence demonstrating the petitioner's financial history

prior to 1998; therefore, it is impossible to conclude that the low net income in 1998 and 2001 occurred within a framework of profitable and successful years.

In fact, the allegations on appeal are unsupported by independent documentary evidence. Specifically, the record merely consists of statements by counsel that attribute the petitioner's poor financial performance to the "International Monetary Fund crisis in Korea" in 1998, and the "internet company bust that shook the computer industry" during 2001. Additionally, counsel asserts that "in light of the overall strength of the company and its bright outlook, petitioner should be adjudged to be financially strong enough to hire the alien if and when he can work legally." The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, these statements are not supported by any type of documentary evidence that is relevant to the issues raised on appeal. Although counsel includes a copy of the petitioner's website and a document that presents an overview of the petitioning entity's composition, these documents fail to independently corroborate counsel's assertions that the petitioner endured uncharacteristic hardship within a framework of profitable years.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification and continuing throughout the time period required by 8 C.F.R. § 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.